IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

BISHOP IRON COMPANY,
Defendant in error,
vs.
THOMAS W. HYDE,
Plaintiff in error.

No. 126.

In Error to the Supreme Court of the State of Minnesota.

BRIEF IN REPLY OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

1. All the demurrers of the defendants, excepting that of Frank B. Forman and Frank W. Forman and of Frank R. Webber were before the Supreme Court on the first appeal. Printed record 24-33-34-42. Original record. 174-5-6.

2. The forty in controversy was not included in the S. H. B. Scrip locations. The description of

these locations is given on page 25 of the printed record. When this description was made it was supposed that Section 30 would be of regular size. Taking this into consideration it will be seen that the descriptions there given cover exactly the same land as shown on the diagram used on the oral argument and which S. H. B. Scrip locations covered when adjusted. Hence, counsel's statement on the oral argument that the S. H. B. Scrip covered the forty in controversy is not correct

3. Counsel on page 12 of their brief do not state our assignments of error correctly. However, this is immaterial, for where the case is an important one and the merits have been fully discussed and presented the Court will consider the case even though the assignments of error are defective.

Fladger vs. Kidd, 78 Fed. 341.
O'Neil vs. Vermont, 144 U. S. 323.

4. When Warren's selection was made the record was not clear, as stated by counsel (brief 26-27). Hyde's application to file a declaratory statement was made July 20th, 1885, nearly two months previous. The date of Warren's selection is given by counsel (brief 98) as April 15, 1885. It should be October 15th, 1885.

5. On page 31 of counsel's brief it is assumed that all decisions which he asks the Court to take judicial notice of, except one, are referred to in the answer. No reference is made in the answer to the commissioner's decision of September 8, 1893, appendix No. 3, nor to Secretary Smith's decision 19 L. D 547, appendix No. 4.

6. The filing of a reply by plaintiff was a waiver of its demurrer. 6 Ency. Pl. & Pr., 385.

7. Counsel statement on page 91 of his brief to the effect that Hyde never suggested "That the entire testimony taken on the point in question did not embrace both Hyde and McDonald" and that "prior to the filing of the cross petition in the case at bar it seems to have been assumed by all sides that the stipulation carried into the whole case the whole testimony, and made the same applicable to Hyde as well as McDonald." It was necessary for counsel to go outside of the record to make this statement. It is not true in fact. As shown by the brief which I exhibited on the oral argument wherein that point was specifically made by me.

8. On page 91 it is stated that the register and receiver in Hyde vs. Stram decided "All claims." If by this it is intended to say they passed on the pre-emption right of Hyde it is not correct, for they did not do so. It is true that the appeal of Eaton took all the papers in the record to the secretary's office, but Hyde's appeal from the rejection of his application to file as a pre-emptor on the forty in controversy was not a part of the record in that case. It was before the commissioner for determination and was acted upon, that is, it was an element on which the commissioner based his order of contest in Hyde vs. Warren Dec. 22, 1888. His appeal was there long after the papers in the regular course of business on Eaton's appeal had gone to the office of the Secretary of the Interior. In some irregular manner the appeal reached the secretary's office, and

as we contend was "a mere excresence" in that record.

9. On page 94 of Counsel's brief it is assumed that Hyde was a party to McDonald's proceedings against scrip location, and it is said that if he were not he went on the stand and testified and heard "the damaging testimony which shows his claim to be illegal," and that his own testimony showed his claim to be invalid. There is nothing in the record to show that Hyde was a party to McDonald's contest. Hyde's testimony did not show his claim to be illegal. The doctrine of estoppel has no application whatever to the case. Hyde had no reason to believe that the testimony was damaging. His conception of the contract would not lead him to believe that it was, and he was under no obligation to interpose in that case or make any defense. It is not shown that he was even present while the McDonald testimony was being given.

10. On page 99 of counsel's brief it is stated that when the Commissioner ordered a hearing upon the Hyde application to contest the Warren selection "Hyde's entire preemption claim upon which alone the application to contest was based, was pending before Secretary Vilas upon the voluminous testimony taken in the prior case, and was there awaiting such disposition as that officer should make of the matter." This is contrary to the express allegations of the answer. We allege that his appeal "was not before the Secretary," that "he has never had a hearing or his day in court," and "that the defendant never had a hearing on his right to file on the land

as a preemptor" (record 21). Again it is clear that the two proceedings were entirely separate, and that the appeal in fact was before the Commissioner. Again it is not true that his application to contest the Sioux Half Breed Scrip was based on his pre-emption claim.

11. Counsel on oral argument stated that the defendants in error were bona fide purchasers in good faith. In the answer it is alleged (record 24) "that each and all of said parties, including the plaintiff, had knowledge and notice of the claims of the defendant prior to the issuing of said patent to said Warren, and the time they respectively acquired their and each of their alleged interest." Again Hyde was in possession of the land, and this was notice to the world of his rights.

12. Neither the Vilas decision nor the decision of the Commissioner dated September 8th, 1893, appendix 3, were published or referred to in the answer; hence judicial notice of them cannot be taken. It is stated by counsel in the oral argument that the reason the Vilas decision was not published was because the case was consolidated with several others. This does not appear from the record in this case.

ARGUMENT.

We objected to the use of matters not properly of record for the reason that they tend to encumber the record and confuse the question before the court. We especially contend that the court cannot take judicial notice of the commissioner's decision above mantioned. He is not the head of the department

and would not come under the rule contended for by counsel. Again his decision as to the illegal contract was mere dictum, he having held that the Vilas decision was *res adjudicata* on that question. Again, Hyde appealed from that decision and the Secretary did not hold that there was an illegal contract. He held that they were not contestants, and that that was the only question in the case, and on that the Vilas decision was *res adjudicata*. Now the only force and effect which can be given to Secretary Smith's decision is that it holds as a matter of law that neither Hyde nor McDonald were contestants, but adverse pre-emption claimants. This holding is in direct conflict with the entire record in the case.

To recapitulate, (1) it is alleged in the answer that the scrip was contested on the ground that it was illegally located; (2) the Commissioner ordered a hearing on that ground; (3) the notice of hearing was issued on that theory; (4) the register and receiver decided only the legality of the scrip locations; (5) the Commissioner on appeal states that the case was based on the charge of the illegality of the locations and onthat ground cancelled them; (6) Vilas affirmed the decision of the Commissioner on the same ground, and (7) Secretary Noble modified the Vilas decision on the ground that they were contestants under the Act of May 14th, 1880. If there is any one fact that the records and proceedings show it is the fact that Hyde and McDonald were contestants of Sioux Half Breed Scrip location and not adverse pre-emption claimants. Hyde's right to the forty in controversy was not affected by this decision.

His rights were terminated by the department, before that decision was made and a patent to the land ordered to be issued to Warren.

The court will not take judicial notice of the facts contained in decisions of cases other than the one before it for consideration, nor of facts in any case recited in decisions other than those *in which the public are inte ested* The cases cited by counsel do not go to the extent claimed by him. All that is held in Caha vs. U. S. 152 U. S. 211 is that the court will take judicial notice of the *rules* of the department. In Heath vs. Wallace, 138 U. S. 578, that the court will take judicial notice of the plat of survey in the general land office. Such plat is a public record and the court would take judicial notice of it without the recital of it in a departmenta decision.

12 Ency. of Law, 171, note 1.
1 Jones Ev. §128.

In Jones vs. U. S. 137 U. S., 202 all that is held is that the court will take judicial notice of statements made by the head of one of the branches of the executive department when they relate to public *to public records* under his control. In Knight vs. U. S. Land Ass'n, 142 U. S. 161, the facts which the court stated it would take judicial notice of "were not contrary to the findings" in the case and were simply alluded to to shed light upon such findings and not to contradict them. In Johnson vs. Drew 171 U. S. 92 all that was held is that the court will take judicial notice of the plat of public survey on file in the general land office. This

as stated before it will do without a recital in a decision.

That courts will take judical notice of their own records cannot be denied, but they will not take judicial notice of facts relating to *private matters* in one case on the trial of another when such decision has not been offered or introduced in evidence.

McCormick vs. Herndon, 67 Wis., 648.
In re Manderson, 51 Fed., 501.
Vassault vs. Leitz, 31 Cal., 225.
Haver vs. Clanberg, 3 Mo. App, 342.
Esterbrook vs. Steel Pen Mfg. Co., 30 N. J. Eq., 341.
Lake Merced Water Co. vs. Cowles, 31 Cal., 215.
State vs. Edwards, 19 Mo., 674.
Daniel vs. Bellamy, 91 N. C., 78.
Enix vs. Miller, 54 Iowa, 551.
Baker vs. Mygatt, 14 Iowa, 131.
Bond vs. White, 24 Kansas, 45.

The true rule seems to be that the court will take judicial notice of the acts of public functionaries contained in public documents published by public authority when they relate to *the affairs of government*, and will not take notice of such matters which have no relation thereto.

1 Greenleaf on Evidence, Section 492.

Again R. S. U. S., Sections 882,891, provide for copies of documents in the office of the Secretary of the Interior and the Commissioner of the General Land Office, and give them the same force and effect as originals. The rule in the

Department of the Interior is that neither the evidence nor the findings thereon in one case shall be considered on the final adjudication of another and independent case where such evidence was not offered at the hearing in the latter case.

Bright vs. Elkhorn Mining Co., 9 L. D., 503.

Again, Hyde's rights to the forty in controversy were not determined by the decision of Secretary Smith, but in another and independent proceeding, and because of Vilas' and Noble's decisions. The State Supreme Court did not consider Secretary Smith's decision. This is evident from the opinion. It is not even alluded to by the State court. It has never been urged or suggested in this case until counsel filed his brief in this court. The Land Department not having considered it as a fact in determining the Hyde case as to this forty or otherwise, and the State court not having done so, it should not be considered here, for this court will only take judicial notice of what the State court did.

Hanley vs Danohue, 116 U. S., I.

Bernard vs. Abbott, 116 U. S., 277.

Secretary Noble's decision In Hyde vs. Eaton, et al, 12 L. D. 157, as before stated Hyde's rights as a pre-emptor not being in issue before the department could dispose of the same and its decision be conclusive it was essential that it conclusively and absolutely appear that he could not succeed no matter what the nature and character of evidence he might produce in his contest against the Warren selection.

Lee vs. Johnson, 116 U. S. 48.

Secretary Vilas considered such right by virtue

of his supervisory power and Secretary Noble had no other question so far as the pre-emption rights were concerned before him than; Was Secretary Vilas' opinion on that feature of the case warranted? It is clear that without the affidavits he should have granted a re-hearing on the ground of the mistake which had been made. The filing of the affidavits did not put the question as to the pre-emption rights in issue if they were not in issue before. Hyde and McDonald specially urged before him that their pre-emption claims were not in issue. (12 L. D. 159) The filing of the affidavits we think cannot be construed as an implied submission of a question to the consideration of which they objected. The consideration of the pre-emption rights by Secretary Vilas was a mere academic question. He directed no formal judgment thereon. Neither did Secretary Noble. He simply refused to consider further the pre-emption claims.

The final judgment of Secretary Vilas was to throw the land open to entry by the first legal applicant. The judgment of Secretary Noble was to modify Secretary Vilas' decision "to the extent of saying that the preference right of entry in either of these parties is not decided." Did this not allow them to apply to enter the land in any form they chose? What more could he have done? This judgment is as ample and complete as it could have been made. The preference right to enter included the right to enter the land as pre-emptors. Therefore Secretary Noble left that question open and particularly refrained from expressing an opinion thereon. But if it be held that the filing of the affidavits was

a submission of the question as to the contract to Secretary Noble, then we say that on such affidavits there was but one decision which could be made, and that was that there was not an illegal contract, and the finding of the secretary, if it can be called such, contrary to this undisputed evidence is not binding on the court. As was said by Justice Miller in Marquis vs. Frisbie, 101 U. S. 437, "if it can be made entirely plain to a court of equity that on the facts about which there is no dispute or no reasonable doubt those officers have by mistake of law deprived a man of his right, it will give relief."

But we submit that the most that can be said of the filing of these affidavits is that they were before Secretary Noble in the same manner as they would be before Secretary Vilas to determine one question, and that was, whether the evidence in reference to the contract showed conclusively that an illegal contract had been made. That they do this will not be contended for a moment. Hence the finding thereon on a question not in issue is not binding on the court.

Counsel in his brief has entirely failed to discuss the point made in our brief to the effect that in a contest for the right of pre-emption under Sec. 2273 R. S. U. S. the register and receiver should first decide the question, then the Commissioner of the general land office, whose decision is final unless an appeal is taken.

If it be held by this court that the commissioner of the general land office in his decision of August 4th, 1888 (record 28-32, see page 31, fol. 62-63) re-

jected the application of Hyde to file so far as it related to Lots 5 and 6 and the SE. ¼ of NW. ¼ of Section 30, then it is clear that the pre-emption right of Hyde was not before Secretary Vilas nor was it before Secretary Noble. The decision of the Commissioner thereon would be final, and that was the rejection of such application because it did not antadate the location of the scrip.

It was proper to do what was done submit the counter-claim and principal action to the court at one time.

Miners' Bank vs. W. S. 5 How. U. S. 213.
Ayers vs. Carver 17 How. U.S. 591.

On an appeal from a judgment the Supreme Court of Minnesota "may review any intermediate order involving the merits or necessarily affecting the judgment."

General Statute Minnesota, 1894, Sec. 6140.

In conclusion we submit that on a general view of the whole case it appears that Hyde has never admitted or testified to an illegal contract—that he has never been called to meet such a charge for none was ever made—that he has persistently and repeatedly applied to be heard on that question and been denied that the only proceedings in which evidence was taken where the question could be said to be in issue resulted in Secretary Smith's decision and he falls back on the Vilas decision, and does not find on that question—hence there is no decision of the department to the effect that there was an illegal contract other than the opinion of Secretary Vilas and the refusal of Setretary Noble to take further action

in reference thereto. He has been deprived of his rights because of the testimony of another and his own perverted in another case in a proceeding where the question was not in issue. We submit that this is not "due process of law" and that is inequitable and unjust. Such proceedings does not command our respect for the law nor evidence the purity of its administration which Chief Justice Marshall says "comes home in its effects to every man's fireside and passes upon his property, his reputation, his life, his all."

We submit that after nearly sixteen years of terrible struggle to maintain his rights and defend his home and his name against fearful odds that he should not by the judgment of this court be deprived of his property and branded as a perjurer and a conspirator to defraud the government unless the record clearly warrants such a judgment. We submit that it does not.

L. A. PRADT and JOHN BRENNAN,
Attys. for Plaintiff in Error.